2005 BNH 034 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

River Valley Fitness One, L.P.,
Debtor

Bk. No. 01-12829-JMD
Chapter 11

River Valley Fitness One, L.P.,
Plaintiff

v.

Adv. No. 04-01034-JMD

Pierre Thibeault,
Defendant

James W. Donchess
Donchess & Notinger, PA
Nashua, New Hampshire
Attorney for Debtor/Plaintiff

Pierre Thibeault
Verdun, Quebec
Canada
Pro Se Defendant

MEMORANDUM OPINION

I. INTRODUCTION

This case involves a contract dispute between the debtor, River Valley Fitness One, Limited Partnership (the "Debtor"), and Pierre Thibeault ("Thibeault") a consultant/contractor for the Debtor. The Debtor initiated this adversary proceeding to object to a proof of claim filed by Thibeault (POC 71) and to recover damages for alleged breaches of the postpetition contract

which is the basis of the claim (the "Complaint"). The Debtor seeks recovery against Thibeault on three counts: Count I of the Complaint is a breach of contract claim; Count II is a breach of warranty claim; Count III is a negligence claim. The Court held a two-day trial on the Complaint on February 24 and 25, 2005. At the close of the trial the parties agreed the conflicting claims were based solely on a alleged breaches of contract, which the Court took under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTUAL BACKGROUND

A. Relationship Between the Debtor and Thibeault

On September 11, 2001, the Debtor filed a petition for bankruptcy protection under chapter 11 of the Bankruptcy Code. The parties had a business relationship that predated the Debtor filing for bankruptcy protection. The Debtor operates a fitness center known as River Valley Fitness Club ("the Club"). From 1999 through 2003, Thibeault supplied consulting services to the Debtor regarding development of plans for proposed tennis facilities at the Club and repairs and alterations of the ceiling in the pool and gym areas of the Club. In early 2003, the parties entered into two contracts. The first contract was for Thibeault to continue to provide consulting services about a proposed installation of tennis courts at the Club (the "Tennis Contract"). The second contract was for Thibeault to repair the water-logged insulation in the

ceiling over the indoor pool and gym areas by constructing a "suspended ceiling" of insulation below the existing water-logged ceiling (the "Pool Contract").

B. The Tennis Contract

On January 22, 2003, the Debtor agreed to renew the prepetition Tennis Contract with Thibeault. Under this contract, Thibeault agreed to provide management consulting services for the tennis project, and the Debtor agreed to pay Thibeault $75.00 per hour plus "all expenses incurred in the performance of his work after presentation of a written expense account." (Ex. 2.) At the trial, neither party contested the existence of the Tennis Contract, the services provided thereunder, or to the amount of $3,200.00 claimed by Thibeault.

C. The Pool Contract

During late 2001, serious problems developed with the insulation above the Club's indoor pool. Water vapor was condensing and collecting in the insulation in the pool ceiling. The weight of the water created the possibility that sections of the ceiling could fall. In addition, the waterlogged fiberglass insulation provided virtually no thermal insulation. After attempting several unsuccessful self-help techniques to resolve the waterlogged insulation problem, the Debtor and Thibeault discussed a repair that would utilize a proprietary suspended-insulation design developed by Thibeault. From early 2002 through early 2003, after on-site inspections of the pool and gym areas, Thibeault submitted three proposals to design and install a suspended-insulation system to repair the problems. (Exs. 102, 103, and 105.) The second and third proposals were roughly comparable in what was included and excluded from the job but differed significantly in the proposed work schedules, the earlier proposing four weeks for completion of the work while the later proposed only two weeks.

The final proposal, dated January 21, 2003 (the "Proposal"), provided that Thibeault would: (1) supply the materials, labor, and equipment needed to repair the insulation in the roof of the indoor pool and gym areas of the Club based on Thibeault's proprietary design; (2) coordinate and supervise the subcontractors; (3) complete the project in two weeks; (4) be paid $69,200.00 for these services; and (5) receive a deposit of 50% of the projected cost ($34,600.00) upon execution of the contract. The Proposal also included a list of exclusions, such as lowering the sprinkler system and ventilation ducts, installing the attic ventilation and an anchor system at the end of the building, and relocating ventilation fans.[1]

1. Price

The original price in the Proposal was $69,200.00. The exhibits indicate that while the work was in progress, the Debtor agreed to change orders to remove the waterlogged insulation, anchor the support system, insulate the wall between the pool and the gym, repair the roof, and dismantle duct work (Exs. 12 and 101),[2] which added an additional $7,970.00 to the cost of completion. (Ex. 12.) In subsequent correspondence the parties agreed the payment for supervisory work would be invoiced at 10% of subcontractors' fees and paid upon completion of the job. (Ex. 5.) Therefore, the final Pool Contract price was $70,200.00 plus 10% for supervision of subcontractors.

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[1] As discussed in section II.B.1 below, the Proposal was agreed to between the parties and became the Pool Contract.

[2] The Court further notes that some evidence was presented at trial that referred to a proposal to add two air exchange units in the gym. However, there was no evidence to support a finding that this proposal was accepted (Exs. 12, 13, 14 and 15). Accordingly, this price to add the air exchange units is not included in the contract price.

2. Payment Terms and Installments

Although the Proposal did not specify the method for subsequent payments, later correspondence between the parties indicates the Debtor agreed to pay Thibeault an additional $20,000.00 upon completion of the pool area, which was projected to be at the end of the first week. The balance ($14,600.00) was to be paid upon completion of the gym area, projected to be at the end of the second week. These subsequent payment terms were suggested by Thibeault and agreed to by the Debtor.

On January 27, 2003, Thibeault billed the Debtor $30,000.00 as a first installment toward the 50% deposit, which the Debtor promptly paid. On March 23, 2003, Thibeault billed the Debtor for the remaining $4,600.00 of the down payment, which the Debtor also paid promptly. (Ex. 5.) On April 10, 2003, before the job commenced, Thibeault acknowledged receipt of the $4,600.00 check. (Ex. 6.) On the same day, he requested that payment of the $20,000.00 installment–the amount the parties had agreed would be paid upon completion of the pool area–be paid on April 18, 2003, the end of the first week of the job. The Debtor responded that the check was drafted and would be available to Thibeault on the date requested. Thibeault timely received the $20,000.00 check. However, Thibeault's bank did not honor the check because Thibeault's wife had endorsed it instead of Thibeault. On May 1, 2003, the day Thibeault learned the check was not honored, he informed the Debtor of the problem. (Ex. 21.) Additionally, on April 21, 2003, Thibeault had acknowledged receipt of a $2,000.00 cash advance from the Debtor. (Ex. 109.) Therefore, the Debtor sent to Thibeault checks totaling $56,600.00 over the course of his work, of which $36,600.00 actually became collected funds in Thibeault's bank account.

3. Work Schedule

The work schedule provided with the Proposal indicated the project would take two weeks to complete. (Ex. 1.) The job was scheduled to begin on Monday, April 14, 2003, and was to be completed by Saturday, April 26, 2003. Correspondence between the parties prior to the inception of the work indicates that both parties were aware that the timing of the repairs and the duration of the project were critical because the Club had to close the pools and gym while the work was being done. (Ex. 8, 9, and 17.) Accordingly, the parties agreed to schedule the shut down of the pool and gym areas for two weeks near Easter, because the pool was used less during this period. Furthermore, correspondence between the parties while the work was in progress indicates Thibeault was aware that timely completion was critical. (Ex. 17.) For example, every correspondence the Debtor sent to Thibeault regarding job progress requested immediate notification if the scheduled completion date for the pool area could not be attained.

D. Work Progress on the Pool Contract

On April 12, 2003, Thibeault began the job, as scheduled. Email correspondence between the parties during the first four days of the job indicates the job was progressing as scheduled. However, some adjustments to Thibeault's duties, such as the need to remove the wet insulation, were added. Nonetheless, the projected completion date was not altered. (Exs. 8, 9, and 11.)

On the afternoon of April 18, 2003, the end of the first week and the date the pool area was scheduled to be complete, Thibeault informed the Debtor by email that the insulation removal in the pool area was one half complete and would be completed the next day. In the same email, Thibeault gave his first revised completion date for the pool area, changing it from

April 18 to the following Friday, April 25, 2003. (Ex. 15.) Email correspondence between the parties during the second week of the project indicates Thibeault's projected completion date was revised three more times. These emails also suggest the second and third delays were caused by structural problems Thibeault had not foreseen, such as the need to insulate between the walls of the gym and the pool area and the need to attach the interior walls to the structure of the building. (Exs. 16 and 17.)

At the end of the day on Saturday, April 26, 2003, the original completion date, Thibeault announced the third delay with an assurance that he would try to complete the pool area by the end of the next day. (Ex. 16.) In response, the following morning, the Debtor notified Thibeault that 6 p.m., on April 27, 2003, was the "absolute, final deadline" for completion. (Ex. 17.) Nonetheless, this deadline was also missed and Thibeault promised completion by Wednesday, April 30, 2003, instead. (Ex. 18.) The Debtor did not agree to the new deadline and, in any event, this proposed deadline was also missed.

At the end of the day on Thursday, May 1, 2003, after informing the Debtor of yet another delay, this one caused by a design flaw, Thibeault projected a new completion date of Sunday, May 4, 2003. Thibeault explained that this delay was caused by a technical problem for which he "assumed complete responsibility [for] acting against the better judgment of [his] supervisor." In the same message, Thibeault stated he needed to be assured the $20,000.00 installment as well as a supplemental invoice for $8,130.00 would be paid. (Ex. 23.) The Debtor's reply questioned the amount of the supplemental invoice, expressed its concern that the project would ever be completed properly, and announced its intention to have a professional engineer inspect the job upon completion. (Ex. 24.) The next morning, on May 2, 2003,

Thibeault responded with an explanation that the scope of the job exceeded his expectations. He then promised to complete the job "as well and as fast as possible." (Ex. 25.)

Later that afternoon, Thibeault announced he was "shutting down the work site and returning to Montreal" immediately because he learned the Debtor had stopped payment on the $20,000.00 check that had not been paid by his bank. (Ex. 31.) The Debtor responded that the check would be reissued and Thibeault would be paid in full once the job was complete and an engineer approved it. (Ex. 31.) In subsequent correspondence from the Debtor to Thibeault on May 5, 2003, after Thibeault had abandoned the job site and removed all his tools, the Debtor permanently suspended all work by Thibeault and requested that he not enter the Club premises in the future. (Ex. 32.)

E. Design and Construction Problems with the Pool Contract

Asch, the Debtor's representative during the negotiation of the Pool Contract and for all amendments to that contract, was abroad during the time the work was proceeding. Therefore, the on-site employees "served as the eyes and ears" of Asch. Email correspondence and trial testimony indicate that the Debtor's employees began to question the safety and soundness of Thibeault's construction techniques toward the end of the second week of the job. (Exs. 18 and 19.) An employee testified about his first-hand observations of Thibeault's alleged poor workmanship, and numerous photographs of these problems were entered as evidence. (Exs. 37 and 38.) The major design and construction problems alleged by the Debtor consisted of: (1) triple-level staging being set up on top of a non-bearing shed roof, (2) the screws used to anchor the support cables to the supporting steel beam failing and the screw heads popping off, (3) the steel beam to which the screws were attached deforming and bending, and (4) a steel beam being

mounted with only two bolts at each end rather than utilizing the four bolt holes drilled through the beam for mounting. (Exs. 22, 24, and 25.)

F. Thibeault's Claim and the Debtor's Objection Thereto

On May 30, 2003, Thibeault sent the Debtor an invoice for $13,950.00, which included $10,650.00 for 142 hours of consulting and $3,000.00 for transportation time, mileage, and lodging. On June 11, 2003, Thibeault filed a proof of claim ("POC") in the Debtor's bankruptcy case for $51,120.00, which included the alleged unpaid balance on the Pool Contract and the unpaid balance on the Tennis Contract. The Debtor objected to the POC on December 1, 2003, stating it owed Thibeault nothing because Thibeault's negligence and breach of contract forced the Debtor to hire a new contractor who had to start the job over again. (Doc. No. 595 in the main case.) Thibeault denied the allegations in the Debtor's objection. (Doc. No. 603 in the main case.) On February 2, 2004, the Court converted the Debtor's objection to an adversary proceeding and directed the Debtor to file a complaint. (Doc. No. 616 in the main case.)

At the close of the trial on the Complaint, the Court directed both parties to file proof of damages statements. In response, the Debtor maintained that the total damages it suffered amounted to $43,000.00 based on an assertion it is entitled to the $30,000.00 it paid Thibeault plus $13,000.00 to cover the difference in the contract amount with Thibeault, which it asserts is $69,000.00, and the amount it paid the contractor who completed the job ($82,000.00). Thibeault asserted he is owed $51,120.00, the amount specified in the POC. This amount includes $3,200.00 for the Tennis Contract.

III. DISCUSSION

The issue in this case is what amounts, if any, the Debtor owes Thibeault for outstanding invoices for the Pool Contract, and what amount, if any, Thibeault is liable to the Debtor for damages due to breach of contract, breach of the implied warranty of workmanship, or negligence. The Tennis Contract is not at issue except to the extent any amount owed to Thibeault under this contract may offset a damage award.

A. Burden of Proof

Bankruptcy law states, "a proof of claim executed and filed in accordance with [the] rules shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). Such a claim creates a presumption of validity that must be objected to and rebutted with evidence. In re Stafford, 192 B.R. 29, 33 (Bankr. D.N.H. 1996) (citing Burger v. Level End Dairy Investors (In re Burger), 125 B.R. 894, 902 (Bankr. D. Del. 1991)); In re Beverages Int'l Ltd., 50 B.R. 273, 280 (Bankr. D. Mass. 1985). If the presumption is overcome, the claimant bears the ultimate burden of persuasion to establish the validity of the claim. Stafford, 192 B.R. at 33 (citing In re Burger, 125 B.R. at 902). The burden of persuasion requires enough evidence to persuade the trier of fact that the alleged facts supporting the claim are true by the relevant evidentiary margin. Garrity v. Hadley (In re Hadley), 239 B.R. 433, 437 (Bankr. D.N.H. 1999) (citing Black's Law Dictionary 178). A preponderance of the evidence is required to meet the burden of persuasion regarding the validity of a proof of claim. Stafford, 192 B.R. at 33 (citing In re Burger, 125 B.R. at 902).

Although the proof of claim filed by Thibeault is not in the form of an official proof of claim, the contents substantially comply with what is called for under the Federal Rules of

Bankruptcy Procedure. See Fed. R. Bankr. P. 3001(a). Accordingly, the Court finds Thibeault's proof of claim is entitled to a presumption of validity. The Debtor presented sufficient evidence on all counts to rebut this presumption of validity for the portion of the proof of claim that pertains to the Pool Contract but presented no evidence rebutting the validity of the Tennis Contract. Accordingly, the portion of the proof of claim regarding the Tennis Contract ($3,200.00) is presumed valid but Thibeault bears the burden of persuasion by the preponderance of the evidence regarding the validity of his proof of claim regarding the Pool Contract.

The Pool Contract did not include an express choice of law provision but the work was to be performed at the Club, which is located in New Hampshire. Accordingly, New Hampshire law will govern interpretation of the contract. Cecere v. Aetna Ins. Co., 145 N.H. 660, 662 (2001) (holding that in the absence of an express choice of law provision both the validity and performance of the contract are to be governed by the law of the state with which the contract has its most significant relationship).

When a plaintiff brings a breach of contract claim with respect to a contract that contains mutual and dependent clauses, in order for the plaintiff to recover, "the burden [is] on the plaintiff to prove substantial performance of his contract and that he proceeded in good faith." McNeal-Edwards Co. v. Frank L. Young Co., 51 F.2d 699, 702 (1st Cir. 1931). Nonetheless, according to New Hampshire contract law, once the sufficiency of a subcontractor's performance is questioned, the subcontractor has the burden to prove substantial performance. A. W. Therrien Co. v. H. K. Ferguson Co., 470 F.2d 912, 914 (1st Cir. 1972). See also Superior Trailer Mfg. Corp. v. J. W. Scatterday, Inc., 241 Ind. 459 (1960); George v. Goldman, 333 Mass. 496 (1956); Divito v. Uto, 253 Mass. 239, 243 (1925). The Court finds the Debtor presented

sufficient evidence to demonstrate it acted in good faith to substantially perform its obligations under the contract and to call into question the sufficiency of Thibeault's performance. Accordingly, Thibeault bears the burden of proving performance under the contract.

B. Count I: The Breach of Contract Claim

The issue under this count is which party breached the contract and what are the corresponding damages.

1. The Pool Contract

Before the Court can determine which party breached the Pool Contract, the Court must first determine that the parties formed a contract. Contracts complaints are decided based on controlling state law which, in this case, is New Hampshire law. Pursuant to New Hampshire contract law, a contract may be proved wholly or partly by written or spoken words or by other acts or conduct. Dedes v. Dedes, 93 N.H. 215, 217 (1944). The inquiry into whether a contract has been formed is an objective one. See Simonds v. City of Manchester, 141 N.H. 742, 744 (1997); McConnell v. Lamontagne, 82 N.H. 423 (1926). "In order for a contract to be formed there by must be a meeting of the minds as to the terms thereof." Fleet Bank–NH v. Christy's Table, Inc., 141 N.H. 285, 287-88 (1996) (citations omitted). "[R]easonable certainty that a meeting of the minds occurred is all that is necessary to evidence a contract." Estate of Younge v. Huysmans, 127 N.H. 461, 465-66 (1985). Where there is a conflict in the evidence, the existence and the terms of the contract are issues to be resolved by the trier of fact who may accept or reject in whole or in part any testimony of the parties. See O'Donnell v. Cray, 109 N.H. 223, 225 (19968); Al Saucier & Son, Inc. v. McVetty, 107 N.H. 419, 421 (1966).

The proper interpretation of a contract is ultimately a question of law for the Court. Lawyers Title Ins. Corp. v. Groff, 148 N.H. 333, 336 (2002); Royal Oak Realty Trust v. Mordita Realty Trust, 146 N.H. 578, 581 (2001); Merrimack Sch. Dist. v. Nat'l Sch. Bus Serv., Inc., 140 N.H. 9, 11 (1995); Rest. Operators, Inc. v. Jenney, 128 N.H. 708, 710 (1986). When interpreting a written agreement, the Court must give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was executed, and reading the agreement as a whole. Lawyers Title Ins. Corp., 148 N.H. at 336-37; Royal Oak Realty Trust, 146 N.H. at 581; Merrimack School Dist., 140 N.H. at 11. "When there is a question of fact concerning what was intended by certain terms within a contract, the dispute is to be resolved by the trier of fact, whose findings will be upheld if supported by the evidence." R. Zoppo Co. v. City of Dover, 125 N.H. 666, 671 (1984) (citing Peabody v. Wentzell, 123 N.H. 416, 418-19 (1983)), cited in Rest. Operators, Inc., 128 N.H. at 710.

In the instant case, the Debtor and Thibeault agreed upon the material terms for the Pool Contract in 2003 and, thereby, entered into a contract. The Proposal was Thibeault's offer and the Debtor's payment of the first installment toward the down payment indicated its acceptance. Thereafter, the parties acted in a manner consistent with a contract having been formed. Accordingly, the Court finds the parties agreed to the terms of the Proposal as the Pool Contract.

As outlined in sections II.C and II.D, the relevant terms of the Pool Contract (the "Terms") were the terms set forth in the Proposal as modified by the price terms, payment terms, and work schedule agreed to in subsequent correspondence between the parties. The Terms are summarized as follows: Thibeault would supply the materials, labor, and equipment needed to repair the insulation in the roof of the indoor pool and gym areas of the Club based on his own

proprietary design, coordinate and supervise the subcontractors, and complete the project no later than 6 p.m. on April 27, 2003; the Debtor would make a deposit of 50% of the projected cost ($34,600.00) upon execution of the contract with another $20,000.00 due upon completion of the pool area and the balance due upon completion of the job; and the price for the Pool Contract (the "Contract Price"), as adjusted for change orders, was $77,170.00 plus 10% of subcontractors' fees.

Generally, when a contract does not specify that time is of the essence, even if a certain period of time is stipulated for completion, "equity treats the time limitation as formal rather than essential . . . ." Catholic Med. Ctr. v. Exec. Risk Indem., Inc., 151 N.H. 699, 703 (2005) (citing Leavitt v. Fowler, 118 N.H. 541, 543 (1978)). "As a general rule, time is not considered to be of the essence unless the contract specifically states it is." Id. (quoting Mailloux v. Dickey, 129 N.H. 62, 66 (1986)). However, it is not necessary to use the exact phrase "time is of the essence." Instead:

> In order to determine whether time is of the essence in an agreement, the trier of fact should not use a mechanical test, but should determine the intent of the parties in light of the instrument itself and all the surrounding circumstances, including the parties' words, actions, and interpretation of their agreement.

Id.

Even though the Pool Contract did not specify that time was of the essence, the surrounding circumstances indicate it was. Both parties' conduct indicated they understood the time to complete the project was essential. During the pre-contract negotiations, Thibeault modified the projected completion time from four weeks, as presented in his second proposal, to two weeks, as set forth in the Proposal. The work under the Pool Contract was scheduled for a

period with historic low usage of the indoor pool. Furthermore, all communications from the Debtor emphasized the importance of time, and Thibeault's correspondences to the Debtor addressed every completion delay, even delays as short as one day. Although the Debtor acquiesced to several of these delays, thereby extending the deadline under any time is of the essence requirement in the Pool Contract, the requirement was never waived or eliminated. Accordingly, the Court finds time was of the essence and that the final completion deadline was April 27, 2003.

2. The Breach

The Court finds that Thibeault breached the Pool Contract because his proprietary design was inadequate, there were unforeseen problems with the installation, and he did not complete the project by the April 27, 2003, deadline. Thibeault was the architect and installer of the insulation repairs that were based on his own design. Although installation problems alone are not a cause for breach, in this case they were Thibeault's responsibility because the installation was based on a proprietary design he proposed after ample opportunity to inspect the Club. Finally, although there is evidence that some of the completion delays were caused by factors beyond Thibeault's control, the final delay was caused by anchors that, after installation by Thibault's workmen, snapped and pulled away from the wall. When Thibeault communicated this problem to the Debtor, he said he "assumed full responsibility [for] acting against the better judgment of [his] supervisor who recommended additional support because the walls were not solid enough." This design failure did not excuse Thibeault's failure to meet the deadline because it was Thibeault's design that failed.

Thibeault seems to have been arguing that the Debtor's decision to stop payment on the $20,000.00 check was a breach that excused his decision to abandon the project before completion. The Court finds this argument unconvincing. Thibeault is the party who introduced the payment terms, which included completion of the pool as a condition for receipt of the $20,000.00 installment. Thibeault requested an advance payment of this amount in response to which the Debtor drafted the check and had the Club hold it until April 18, 2003, the date Thibeault had originally projected for completion of the pool area. On April 18, the pool area was not complete so the condition for payment had not been met. Therefore, the Debtor was under no obligation to release the check but neither was it prohibited from doing so. The check for $20,000.00 was released to Thibeault on April 18, the same day the Debtor was informed of the first delay.[3] The Court also notes that Thibeault created the opportunity for the Debtor to stop payment on the check when the check was endorsed by the wrong party.

C. Count II: The Breach of Warranty Claim

The Debtor contends Thibeault breached the implied warranty of workmanlike quality (the "Implied Warranty") based on the fact that the partial work done by Thibeault did not meet workmanlike standards and itself needed to be fixed. New Hampshire recognizes that an implied warranty arises when a general contractor is contractually bound to provide services to a property owner. Lempke v. Dagenais, 130 N.H. 782 (1988); Norton v. Burleaud, 115 N.H. 435 (1975); Wentworth Hotel v. F.A. Gray, Inc., 110 N.H. 458 (1970). As a general rule, a

[3] There is no evidence indicating whether Thibeault took possession of the check before or after he informed the Debtor of the delay but this fact is irrelevant. The Debtor's release of the check did not amount to a waiver because Thibeault was the one who proposed the payment upon completion of the pool area.

contractor constructing a building impliedly warrants that the building will "be constructed in a workmanlike manner and in accordance with accepted standards." Norton, 115 N.H. at 436. Furthermore, New Hampshire law recognizes that this duty can arise both as contractual and tort obligations. See, e.g., Lempke, 130 N.H. at 793; Ellis v. Robert C. Morris, Inc., 128 N.H. 358, 361 (1986). The burden is on the plaintiff to show the defendant's workmanship caused the defect and on the defendant to establish any defenses.[4] Lempke, 130 N.H. at 794.

In this case, the Debtor provided ample evidence demonstrating, among other things, that due to deficiencies in Thibeault's design and construction techniques: an interior wall was being pulled down; wall angles were being pulled away from the roof and gaps were forming between the wall angles and the wall siding; a support beam was deformed; and a 2,800 pound, roof-mounted air condenser was improperly mounted utilizing only drywall screws and wooden blocks. These defects were recognized as unsafe and, therefore, were removed and rebuilt according to accepted practices. Thibeault failed to offer a defense for these defects. Accordingly, the Court finds the Debtor met his burden of proof, and Thibeault is liable for damages for the cost of remedying the defects that arose due to his breach of the Implied Warranty.

D. Count III: The Negligence Claim

The complaint alleges Thibeault was negligent in his performance of the work. Nonetheless, no evidence or argument was raised at the trial regarding Thibeault's negligence. Accordingly, the Debtor shall be denied recovery under Count III.

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[4] For example, "the builder . . . can demonstrate that the defects were not attributable to him, that they are the result of age or ordinary wear and tear . . . ." Lempke, 130 N.H. at 794 (quoting Richards v. Powercraft Homes, 139 Ariz. 242, 245 (1984)).

E. Damages

For the reasons stated above, the Court finds that Thibeault materially breached the Pool Contract and the Implied Warranty. Therefore, the Debtor may be entitled to damages.

The law of damages seeks to place the aggrieved party in the same economic position it would have been in had the breach not occurred. Marcou Constr. Co. v. Tinkham Indus. & Dev. Corp., 117 N.H. 297, 299 (1977). "In breach of contract cases, the purpose of awarding damages is not merely to restore the plaintiff to his former position, but to give him the benefit of his bargain–to put him in the position he would have been in if the contract had been fulfilled." M.W. Goodell Constr. Co. v. Monadnock Skating Club, 121 N.H. 320, 322 (1981) (citing Emery v. Caledonia Sand and Gravel Co., 117 N.H. 441, 446 (1977)).

The measure of damages for breach of contract is generally the cost to complete the project, less the contract price, plus any damages suffered as a consequence of the delayed completion if the builder abandons the work site before the project is complete. Zareas v. Smith, 119 N.H. 534, 538 (1979) (quoting Hurd v. Dunsmore, 63 N.H. 171, 174 (1884)) ("[T]he [aggrieved party] may be permitted to recover specific consequential damages that 'could have been reasonably anticipated by the parties as likely to be caused by the defendant's breach.'"). Although mathematical certainty is not required to compute damages, M.W. Goodell Constr. Co., 121 N.H. at 323-24, "[t]he party seeking to recover damages has the burden of proving by a preponderance of evidence the extent and amount of such damages." Bailey v. Sommovigo, 137 N.H. 526, 531 (1993).

In this case the Debtor's Proof of Damages did not detail any consequential damages nor was sufficient evidence presented by the Debtor about the damages the Debtor suffered as a

consequence of Thibeault's breach to support an award for consequential damages.[5] Therefore, no consequential damages will be awarded to the Debtor. Accordingly, the damage award will be limited to actual damages, which will be offset by any monies the Debtor owes to Thibeault under other contracts, all as determined based on the record before the Court.

The first step in calculating damages is to determine the scope of the work covered by the Pool Contract and the contract price to complete this work. In this case, the original contract price was $69,200.00. (Exs. 1, 3, and 5.) The parties agreed on what work was to be performed for this price and a list of related work that needed to be completed that was outside the scope of the Pool Contract (the "Exclusions List"). (Ex. 1.) As discussed section II.C.1, the Court found the Contract Price, as adjusted for change orders, was $77,170.00 plus 10% of subcontractors' fees for services to supervise and coordinate subcontractors.[6] Therefore, Thibeault is entitled to a claim for supervisory services, if supported by the evidence presented at trial. The parties provided scant evidence from which the Court can determine the amount that should be allowed for supervisory services.[7] One invoice, however, does show a $1,000.00 charge for supervisory

[5] The Debtor introduced an email and gave some testimony to the effect that the Club stood to lose "thousands of dollars of membership revenue" if the completion deadline was delayed. The Court notes this evidence was introduced to demonstrate that Thibeault knew the importance of the completion date not to establish consequential damages. Furthermore, it lacks the specificity needed to make an award.

[6] The original contract (Ex. 1) called for compensation for subcontractor supervision and coordination at an hourly rate. However, upon Thibeault's recommendation, the parties subsequently modified that term to be 10% of all subcontractors' costs. (Ex. 3.) The Court notes that Exhibit 4 shows billing for project coordination of the pool and gym renovations at $75.00 per hour plus related expenses. However, these terms are contrary to the 10% term Thibeault proposed for consulting services for the pool and gym renovations. (Exs. 3 and 5).

[7] The Court notes Thibeault's exhibits included several invoices for supervisory services that were billed on a time and expense basis, which was the compensation method agreed upon in the Tennis Contract but not the Pool Contract. Thibeault recommended and the Debtor accepted the term of compensation for supervisory services for the Pool Contract at 10% of subcontractors' fees. (Ex. 5.)

services rendered for supplementary work coordination. (Ex. 109.) Accordingly, the Court finds that the final Contract Price, including change orders and payment for supervisory services is $78,170.00.

The next step in calculating damages is to determine the total amount of money the Debtor paid to complete the work covered by the Pool Contract. This amount is determined by adding the Debtor's payments to Thibeault plus payments to any other contractors brought onto the job to complete all work that was within the scope of the Pool Contract. As stated above, the Debtor paid Thibeault $36,600.00. Additionally, the Debtor hired a firm, Trumbull-Nelson Construction Company, Inc. ("Trumbull-Nelson"), to complete the job. It is uncontroverted that the Debtor paid Trumbull-Nelson $82,442.61 to complete the pool and gym renovations. Therefore, the Debtor spent a total of $119,042.61 to complete the Pool Contract ("Completion Costs").

Generally, a damage award would be offset by any amount paid to a subsequent contractor for work beyond the scope of what was covered by the original contract. There is some indication that Trumbull-Nelson provided services to complete work that was included in the Exclusions List. (Ex. 35.) However, the evidence before the Court is not sufficient for the Court to determine what an appropriate deduction for this service should be. Accordingly, because Thibeault failed to establish at trial what work performed by Trumbull-Nelson was beyond the scope of the Pool Contract, the full amount paid to Trumbull-Nelson by the Debtor shall be included in the Completion Cost.

The actual damages ("Actual Damages") are calculated by subtracting the Adjusted Contract Price from the Completion Cost. In this case the Debtor spent a total of $119,042.61 to

complete the job that Thibeault had contracted to perform for $78,170.00. Accordingly, the Actual Damages to the Debtor are $40,872.61.

The damages award is calculated by adjusting the Actual Damages by the amount of any set-off due to Thibeault ("Adjusted Damages"). In this case, Thibeault was owed $3,200.00 for services rendered to the Debtor, from March 17 through April 14, 2003, under the Tennis Contract. Because this claim is based on a separate contractual obligation between the parties that arose post-petition and is uncontested, the Debtor's damage award will be offset by the amount owed for services related to the Tennis Contract. Accordingly, the Actual Damages of $40,872.61 shall be offset by $3,200.00, yielding Adjusted Damages of $37,672.61.

In summary, the damage award is calculated as follows:

Payments to Thibeault under the Pool Contract		$36,600.00
Payments to Trumbull-Nelson to complete Pool Contract	+	$82,442.61
Completion Costs		$119,042.61
Pool Contract Price	-	$78,170.00
Actual damages		$40,872.61
Set-off due for Tennis Contract	-	$3,200.00
Adjusted Damages		$37,672.61

IV. CONCLUSION

For the reasons set forth above, the Court shall issue a separate order:

1. Disallowing POC 71;

2. Finding for the Plaintiff on Counts I and II of the Complaint and awarding damages in the amount of $37,672.61;

3. Finding for the Defendant on Count II of the Complaint.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: November 2, 2005

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge